

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 PORTAL TECHNOLOGIES) (
5) (CIVIL DOCKET NO.
6) (2:11-CV-440-JRG
7 VS.) (MARSHALL, TEXAS
8) (
9) (JUNE 26, 2012
10 YAHOO! INC.) (10:00 A.M.

11 MOTION TO TRANSFER HEARING
12 BEFORE THE HONORABLE JUDGE J. RODNEY GILSTRAP
13 UNITED STATES DISTRICT JUDGE

14

15 APPEARANCES:

16

17 FOR THE PLAINTIFF: (See Attorney Sign-In Sheet)

18

19 FOR THE DEFENDANT: (See Attorney Sign-In Sheet)

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25 (Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 All right. This is the time set for hearing
4 on a motion to transfer venue in the Portal Technologies
5 versus Yahoo, Inc., case -- Civil Action 2:11-CV-440.
6 There is also a pending dispute regarding the protective
7 order the Court may take up secondary, but, first, we'll
8 hear on -- we're here on the motion to transfer venue.

9 Let me ask for announcements at this time.
10 What says Portal Technologies?

11 MR. DAVIS: Good morning, Your Honor, Bo
12 Davis on behalf of the Plaintiff, Portal Technologies.
13 With me today is Mr. Steve Schlather, and he will be
14 doing the argument on the motion to transfer.

15 THE COURT: All right, Mr. Davis.

16 And for Yahoo?

17 MS. WRIGHT: Kristie Wright for Yahoo, Your
18 Honor. Shawn Latchford and Jim Haltom are also here
19 today.

20 THE COURT: And who's going to present the
21 argument on behalf of Yahoo, Ms. Wright?

22 MS. WRIGHT: I will, Your Honor.

23 THE COURT: Okay. All right. Ms. Wright,
24 it's Yahoo's motion to transfer, so we'll hear from you
25 at this time.

1 The Court's allowed each side up to 15
2 minute.

3 MS. WRIGHT: Your Honor --

4 THE COURT: It's up to 20 minutes, I
5 believe.

6 MS. WRIGHT: Your Honor, I did not bring a
7 PowerPoint because I only have eight slides, but I do
8 have handouts.

9 THE COURT: Feel free to approach.

10 MS. WRIGHT: May it please the Court.

11 Kristie Wright on behalf of Yahoo. We're
12 here on the motion to transfer. Just for some
13 housekeeping purposes, we originally filed a motion to
14 dismiss and a motion to transfer, and those were
15 basically the same pleadings filed twice. It was first
16 docketed No. 7 as the motion to dismiss and No. 8 as the
17 motion to transfer.

18 We later withdrew the motion to dismiss, and
19 so today we're proceeding on Docket No. 8, which is the
20 motion to transfer.

21 Yahoo is seeking to transfer to the Northern
22 District of California. I know that the Court is
23 familiar with the standards set forth -- forth in
24 Volkswagen which allows the Court to transfer for the
25 convenience of the parties and witnesses, and in the

1 interest of justice, and just in order to streamline,
2 the parties agree that this action could have been
3 brought in the Northern District of California, so we
4 have that element taken care of.

5 And then when we get to the public interest
6 factors, the parties agree that three of those four
7 factors are neutral, that being the administrative
8 difficulties, flowing from court congestion, familiarity
9 of the forum with the law and avoidance of unnecessary
10 problems with the conflicts of law. On Page 2, it shows
11 that those -- those are agreed that those are neutral.

12 So that leaves us with the four private
13 interest factors and one public interest factor being
14 the localized interest, and Yahoo submits that all of
15 those remaining factors weigh in favor of transfer and
16 that this case should be transferred to the Northern
17 District of California.

18 With regard to the private interest factors,
19 the first being the ease of access to sources of proof,
20 the majority of the sources of proof in this case are
21 more centrally localized in the Northern District of
22 California than anywhere else including the Eastern
23 District of Texas, making the Northern District a much
24 more convenient forum.

25 The witnesses in this case, the Yahoo

1 witnesses, are either located in Sunnyvale, California,
2 which is the Northern District, or in India, which
3 obviously is not connected to either of the districts.

4 Portal seeks to discount, though, the -- the
5 Indian witnesses saying that the -- they should be not
6 factored in, but the evidence is, and this is in our --
7 our materials by affidavit, that these witnesses in
8 India travel to the Northern District of California
9 regularly as part of their work, and that's clearly more
10 convenient for them. They are able to work out of
11 California if they were there for purposes of trial
12 where they would not be able to do that as easily and
13 conveniently as they would in the Eastern District of
14 Texas.

15 Our briefing also reflects that there are
16 nonstop flights from India to the Northern District of
17 California where there are none to the Eastern District
18 of Texas.

19 The same is true of the third party
20 witnesses. The inventor in this case is in Montana, as
21 well as some other fact witnesses associated with the
22 patent, and our briefing, we've demonstrated that there
23 are direct flights from Missoula, Montana, as well as
24 Bozeman, Montana. Bozeman is the city where the
25 inventor lives, and Missoula is the closest airport to

1 Florence, Montana, where those other witnesses live.

2 This is in -- all in Exhibit 1 to our reply
3 briefing, which is Docket No. 32. Obviously, that's
4 more convenient for them to be able to take a direct
5 flight to San Francisco than it would be to have to fly
6 at least one leg, possibly two, to Dallas, and then on
7 to either Shreveport or Tyler in order to get to
8 Marshall.

9 Importantly, there are no named witnesses
10 with any ties to the Eastern District of Texas, so there
11 are no witnesses where this is their home base and this
12 is where they live.

13 THE COURT: No witnesses on Yahoo's side?

14 MS. WRIGHT: None that I'm aware of other
15 than -- well, and the only named witnesses that have
16 Texas connections are the Plaintiff's counsels
17 themselves. In the disclosures, they listed themselves
18 for attorney fee purposes, but other than that, there
19 are no named witnesses in the Eastern District --

20 THE COURT: Talk to me, Ms. Wright, about
21 the distinction between the Northern District of
22 California on Yahoo's side and India. There seems to be
23 some broad-brush language in the pleadings about what's
24 really done with regard to this accused patent in India
25 as opposed to the Northern District of California.

1 I mean, reading between the lines, it looks
2 like to the Court that probably more on Yahoo's side
3 with regard to this patent really is based in India than
4 it is based in the Northern District of California, but
5 if that's not the case, straighten me out.

6 MS. WRIGHT: Currently, there are two
7 engineers that are overseeing the technology. The
8 technology at this point with Yahoo is kind of on a
9 maintenance schedule. There's not a whole lot being
10 done with it. So the engineers that are, quote,
11 unquote, in charge of it are based in India.

12 We have -- since the briefing was filed,
13 we've filed disclosures and supplemental disclosures.
14 We named two individuals in India who are probably the
15 most day-to-day people at this point with the
16 technology.

17 Importantly, though, all of the finance
18 people, all of the marketing people, those -- those
19 folks are all in Sunnyvale, California, which is in the
20 Northern District, and they were also named in the
21 initial disclosures.

22 THE COURT: But is it fair to say with
23 regard to the actual use and implementation of the
24 patented technology the people on Yahoo's side with the
25 most current day-to-day working knowledge are in India

1 and not California?

2 MS. WRIGHT: I don't know that that's
3 necessarily fair. I think that --

4 THE COURT: Tell me what is fair.

5 MS. WRIGHT: There are people in India.
6 There are also people in the Northern District of
7 California, and it's probably a 50/50 split.

8 In terms of the technical stuff, the
9 engineers, those folks are in India. This product was
10 originally started in California when it was originally
11 designed and researched. And then in 2007, it moved to
12 India. So it started out in California. The product
13 itself moved to India. So the day-to-day people that
14 were assigned were in India, but there are also still
15 those folks in California who are at the next level, the
16 higher level.

17 THE COURT: Okay.

18 MS. WRIGHT: They're definitely involved in
19 the product and will be witnesses in the case.

20 THE COURT: But the -- the product itself
21 and its day-to-day maintenance and continued development
22 have been in India for -- are you saying the last five
23 years, give or take?

24 MS. WRIGHT: Correct.

25 THE COURT: Okay. Now, I have another

1 question for you.

2 MS. WRIGHT: Okay.

3 THE COURT: As I know you're aware, there
4 are two other pending cases by the Plaintiff in this
5 case against other Defendants that assert the same
6 patent and the same technology.

7 Tell me why the Court should not give weight
8 to the clear judicial economy that would be achieved by
9 keeping this case in this Court where the same patent is
10 going to be litigated in at least two other cases? I'm
11 assuming many, if not all, of the same disputed terms
12 will have to be construed and the same type testimony to
13 develop the technology and the allegations of
14 infringement or invalidity will have to be heard.

15 Why -- why should the Court overlook that
16 compelling reason to not transfer the case to California
17 in light of those two other cases that are on more or
18 less a parallel track in this Court?

19 MS. WRIGHT: You're correct, Your Honor,
20 there are two other cases. I believe they were filed on
21 the exact same day, and it is the same technology that
22 is accused. I believe that one of the other Defendants
23 has moved to transfer, and the other one has not. So at
24 this point, we're looking at the convenience of the
25 difference between three different cases being tried in

1 three different jurisdictions or possibly two
2 jurisdictions or possibly one jurisdiction. We're
3 looking at the difference between one and three.

4 And, Your Honor, we recognize that. We just
5 feel like the other factors outweigh that judicial
6 economy factor.

7 THE COURT: But you recognize there is a
8 judicial economy factor to be considered?

9 MS. WRIGHT: With the -- yeah, with two
10 other cases pending. We would submit it's not as -- as
11 significant as some of the other cases that have been
12 heard in the past where there are 15 or 20 Defendants
13 wanting to transfer to that many jurisdictions. There's
14 only three pending here, and one of the other ones does
15 have a motion to transfer pending.

16 THE COURT: All right. Also, I want you to
17 tell me about your view or Yahoo's view with regard to
18 the nature of the Plaintiff's contacts with this
19 Defendant. Clearly, your briefing takes the position
20 that the Plaintiff's contacts with the Eastern District
21 are ephemeral, at best, and imaginary, perhaps, at
22 worst.

23 Obviously, Portal Technologies takes a very
24 opposite view in their briefing. Tell me why Yahoo
25 takes its position, and what supports that position.

1 MS. WRIGHT: We recognize that they do have
2 a -- an office in the Eastern District of Texas, and
3 their response did provide some evidence that was not
4 known before in terms of how long it has been there and
5 exactly who works there and that sort of thing.

6 THE COURT: So the contacts are less
7 ephemeral than you originally thought?

8 MS. WRIGHT: We are -- we're not alleging
9 that this is a fallacy that they've created.

10 THE COURT: Okay.

11 MS. WRIGHT: We are saying that they -- they
12 do have an office here. There are apparently some
13 documents there in the office in Frisco. We had asked
14 if we could send a paralegal over to look at those
15 documents to see what they were and perhaps make some
16 copies.

17 Portal declined to allow us to do that prior
18 to the date where that would be allowed underneath the
19 discovery order, the docket control order, so we don't
20 know what those documents are. We don't dispute that
21 they're obviously -- probably have some relevance, but
22 we don't think the presence of these documents in the
23 Eastern District of Texas outweighs the convenience of
24 actual witnesses that will be having to travel or not,
25 or those witnesses in the Northern District of

1 California would not have to travel at all if the case
2 was transferred there, and the other convenience
3 factors, we just don't feel that that -- that presence
4 of the documents in the district outweighs those other
5 factors.

6 THE COURT: All right. What other points
7 would you care to make?

8 MS. WRIGHT: I would like to speak to the
9 next factor being the availability of compulsory
10 process. As I've said, we do have some witnesses in the
11 Northern District of California, so they would obviously
12 be subject to that there. Portal has claimed that there
13 are some witnesses in Montana that will voluntarily
14 appear in Texas, and they want that to be considered as
15 part of this factor.

16 THE COURT: That includes the people you
17 were talking about earlier, doesn't it?

18 MS. WRIGHT: Yes, sir.

19 THE COURT: The inventor?

20 MS. WRIGHT: The inventor and the other
21 folks involved in the patent.

22 THE COURT: Okay.

23 MS. WRIGHT: Judge Craven held in the
24 E. Droplets -- or the Droplets v. E*Trade case back in
25 March of this year, and that's 2:11-CV -- CV-255,

1 Docket No. 99, that a witness' apparent agreement to
2 voluntary -- voluntarily appear in the Eastern District
3 cannot be considered subject to the subpoena power. So
4 even though they claim that they are willing to
5 volunteer here, that cannot be factored in for this
6 element.

7 So we have two Yahoo witnesses. One of the
8 other named parties with knowledge is the attorney that
9 prosecuted the case. Mr. Aronson, I believe it is, and
10 he is in Hayward, California, which is right outside of
11 Oakland, which is in the Northern District of Texas, and
12 he's identified --

13 THE COURT: Northern District of California.

14 MS. WRIGHT: I'm sorry, Northern District of
15 California. And he's identified in -- in Portal's
16 disclosures, as well as Yahoo's disclosures as a person
17 with knowledge.

18 So, basically, there are five United States
19 residents who have been identified collectively in the
20 disclosures excluding Plaintiff's trial counsel, and
21 three of those are in the Northern District of
22 California and are, therefore, subject to compulsory
23 process there.

24 THE COURT: And you would agree with me that
25 there's no compulsory process from either of you with

1 regard to India?

2 MS. WRIGHT: Correct, although those folks
3 do travel periodically as part of their work. I don't
4 know that that necessarily factors into the compulsory
5 process.

6 THE COURT: If they're going to agree to
7 travel from India, I think we've got to count people
8 that agree to travel from Montana.

9 MS. WRIGHT: Correct.

10 THE COURT: Good for the goose; good for the
11 gander.

12 What else?

13 MS. WRIGHT: I'd like to address Portal's
14 claim with regard to the other private interest factors
15 with regard to the delay that might occur. Under
16 Horseshoe Entertainment, a delay that is relevant for
17 consideration here is only recognized in rare and
18 special circumstances, and they must be established by
19 clear and convincing evidence, and we would submit that
20 that has not been met here.

21 Generally, when the delay is actually a
22 factor that weighs against transfer, it's because the
23 motion to transfer has been filed late in the -- in the
24 game, and that's not the situation here. That is our --
25 it was our initial pleading was our motion to transfer.

1 So we don't feel like that argument should carry the
2 day.

3 And we've already addressed the -- the --
4 their other factor, and the other factors was the Court
5 resources, which you've already addressed.

6 The remaining factor is the localized
7 interest, and Portal's position, from what I can
8 understand, is that because the technology is accessible
9 in the Eastern District, that the Eastern District has
10 an interest here, and that is just simply not accurate.
11 That's under the law, under the great weight of the case
12 law, if it's accessible here just as much as anywhere
13 else, that does not convey a localized interest any more
14 so than anywhere else, and --

15 THE COURT: Does it defeat a localized
16 interest?

17 MS. WRIGHT: It doesn't defeat it, but it
18 doesn't outweigh Yahoo's interest in the Northern
19 District of California. In Network Protection Sciences
20 versus Juniper, that was out of your court, there
21 were -- the -- the transfer district, it was held, had a
22 greater interest than the Plaintiff who had an -- who
23 had an office in the Eastern District of Texas, but it
24 was small, and it was fairly recent in their operations,
25 which is similar to what we have here. And the Court

1 held that the Defendant's headquarters in the transfer
2 district outweighed that because they developed the
3 allegedly infringing products there. They employed
4 thousands of employees, and those employees resided
5 there. And all those same factors are here in this
6 case. That's -- the cite to that case is 2012 Lexis
7 7575 from January of this year.

8 THE COURT: All right.

9 MS. WRIGHT: The -- Portal also speaks in
10 their -- I believe their surreply to Yahoo's presence in
11 the Eastern District of Texas, and I just wanted to
12 point out that in our briefing, we did mention a data
13 center in Dallas and some other connections to Texas,
14 not the Eastern District, but to Texas, those were
15 included in the briefing for the purpose of the motion
16 to dismiss to talk about venue and contacts. Those
17 offices do not have anything to do with the accused
18 technology, so they should not be factored in at all in
19 the motion to transfer analysis.

20 THE COURT: What else?

21 MS. WRIGHT: I believe that's all, Your
22 Honor, other than I would point out that the
23 hundred-mile rule, they tried to discount it in their
24 pleadings. I think it's clear that it does apply. One
25 of the Montana witnesses is 400 and some odd miles

1 closer to California. The other one is 655 miles closer
2 to California. Their briefing indicates that their
3 distance is no more relevant than the folks in India,
4 and I think under the hundred-mile rule under the Fifth
5 Circuit, you have to consider those distances, and those
6 do weigh in favor of transfer.

7 THE COURT: Well, I hear your argument.
8 We're talking about very long distances from India, and
9 not insignificant distance from Montana. It appears
10 that differences may exceed the hundred-mile limit, but
11 they don't seem to be proportionately distances on a
12 proportional basis. I mean, if you're coming from India
13 coming to San Francisco and coming to East Texas, it's a
14 long trip no matter how you do it or where you -- where
15 you end up.

16 MS. WRIGHT: And we agree with that, and --
17 and we agree that the case law does discount when you're
18 traveling internationally, but the hundred-mile rule
19 does specifically apply to those witnesses in Montana,
20 and I believe in their briefing, they indicate that it
21 should be -- those witnesses should be discounted just
22 like the international folks.

23 THE COURT: But, I mean, you would agree
24 with me, if you're in Montana and you're going to San
25 Francisco and you're in Montana and you're coming to

1 Marshall, Texas, you're going to take the better part of
2 a day to go either way, and it's not that you've got to
3 take two days to go one place and one day to go to the
4 other. Neither one is an insignificant trip. Either
5 one is probably going to consume a majority of a day's
6 time, and you can probably get from Montana to either
7 place in a day's time.

8 So the distances are different, but the --
9 the actual underlying convenience or inconvenience is
10 not the same as if you'd have to take two days to make
11 one trip and one day to make the other or one trip was
12 an hour-and-a-half flight and the other was an eight- or
13 nine-hour flight. There are differences. Clearly the
14 Court recognizes that, but it doesn't seem that there
15 are just huge variances in those variances when they're
16 compared.

17 MS. WRIGHT: I don't think that they're --
18 definitely it's not going to take you two days to get
19 here from Montana unless you're driving, but I do think
20 if you look at our exhibits that show the convenience of
21 the availability of flights, I do think you can probably
22 get from Montana to California a whole lot quicker than
23 you can to Marshall, Texas. They have direct flights,
24 and it's a shorter flight.

25 THE COURT: And, again, we're talking about

1 two people?

2 MS. WRIGHT: Two to three. They named two
3 in their initial disclosures.

4 THE COURT: Okay. We're not talking about
5 10 or 12?

6 MS. WRIGHT: No, we've only got seven people
7 named at this point, so we're not dealing with a lot.

8 THE COURT: All right. All right. Thank
9 you, Ms. Wright.

10 MS. WRIGHT: Thank you.

11 THE COURT: I'll hear a response from Portal
12 Technologies.

13 MR. SCHLATHER: May it please the Court.
14 Steve Schlather for Portal. Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. SCHLATHER: As an initial matter, I
17 think that it should be mentioned that Yahoo bears the
18 burden here of showing that the Northern District of
19 California is a clearly more convenient forum for this
20 case, and that's a significant burden, and Yahoo has --
21 has failed to meet it here.

22 Portal resides in this district. I don't
23 think that's disputed at this point. There is maybe
24 some -- some argument about that in the briefing
25 initially, but --

1 THE COURT: No, it doesn't sound like it's
2 disputed any further.

3 MR. SCHLATHER: Correct. Including Portal's
4 CEO is resident in its Frisco offices and has been
5 there -- Portal was formed in April of 2010, so more
6 than a year before the case was filed. So it's
7 definitely not an artifact of litigation or an
8 ephemeral --

9 THE COURT: And I don't have the disclosures
10 in front of me. Do you anticipate the CEO to be a live
11 witness at trial?

12 MR. SCHLATHER: He wasn't listed.

13 THE COURT: Do you expect him to be a
14 corporate representative present at trial?

15 MR. SCHLATHER: He may be. I don't think
16 we've -- we've made that decision yet.

17 THE COURT: Okay.

18 MR. SCHLATHER: Just jumping straight --
19 straight into the -- the factors, we -- we do disagree
20 with -- with Yahoo on the -- the Court congestion
21 factor. I think originally that was neutral, early on.
22 The time to trial in this district versus Northern
23 California was approximately the same. We've now been
24 set for trial in -- in 2013. If we get transferred to
25 Northern California, we go to the back of the line and

1 we're still looking at two years for a trial date,
2 according to the statistics. So at a minimum, it looks
3 like we'd be delayed at least a year as a result of a
4 transfer at this point.

5 Conflicts of laws and the Court's
6 familiarity with -- with patent law, I think both of
7 those are neutral, and we agree on that.

8 The -- the other public factor, just to
9 finish up the -- the four public factors, was the local
10 interest. Again, Portal is located in this district,
11 and that gives this Court a strong interest in hearing
12 this case. Yahoo does have a presence in the state,
13 albeit just outside the district in Dallas, and I
14 believe there's also some facilities in Tarrant County,
15 which I believe is down near Austin. So they have a --

16 THE COURT: No, Tarrant County is Fort
17 Worth.

18 MR. SCHLATHER: Fort Worth. My apologies.
19 I need to look at my --

20 THE COURT: That's all right. You've not
21 contended that those facilities directly relate to the
22 patented technology?

23 MR. SCHLATHER: I don't -- I don't think we
24 do. We don't contend that.

25 THE COURT: Okay.

1 MR. SCHLATHER: Turning to the private
2 factors, access to proof, Portal does have about 136
3 boxes of -- of documents in its Frisco office, and those
4 are substantially all of the documents of the company.
5 They're -- they're hard copy documents, so they're not
6 easily transportable, versus Yahoo's documents, which
7 according to its briefing, are primarily electronic in
8 nature, presumably are accessible, including in this
9 district, but also at least in its facilities in Dallas,
10 which is not -- not far from here.

11 The -- the witnesses, I think we've heard a
12 discussion already this morning, the folks in India,
13 which -- who appear to be the more important witnesses
14 in terms of the infringing technology, are located in
15 India. If they have to get on a plane to come to the
16 U.S., whether it's San Francisco or whether it's
17 Marshall, I think they're equally inconvenienced at that
18 point. It doesn't sound like Yahoo disagrees with that.
19 For the folks in Montana, I think the analysis is
20 similar that we don't disagree that the hundred-mile
21 rule applies, but if you're in Montana and you're having
22 to get on a plane to travel, it's equally inconvenient
23 to go to San Francisco as it is to -- to come down to
24 Marshall.

25 With regard to compulsory process, it sounds

1 like there may be only one witness, the prosecution
2 counsel, that really needs to be considered here, and
3 that -- that gentleman is in the -- in the Northern
4 District. Yahoo cites some of its own witnesses, but I
5 think the case law makes clear that when we're
6 considering compulsory process, we primarily look at --

7 THE COURT: Third parties.

8 MR. SCHLATHER: -- third parties, right, or
9 nonparties, correct, not -- not party witnesses. The --
10 the inventor and other witnesses in Montana have agreed
11 to appear in this Court, if necessary.

12 THE COURT: What's your response to
13 Ms. Wright's argument that that agreement really isn't a
14 factor, it could be easily withdrawn at some future date
15 and the Court shouldn't consider it in its venue
16 analysis?

17 MR. SCHLATHER: Well, I think in that case,
18 it makes that factor neutral at worst. If we do count
19 it, that factor weighs in favor -- or weighs against
20 transfer. If we do discount it, then -- then it makes
21 that factor neutral. So in a worse case scenario, we're
22 looking at the factor of compulsory process as
23 essentially -- as essentially neutral.

24 The -- the cost of attendance, again,
25 there's not -- when you're talking about flying from

1 Montana or flying folks in from India, the additional
2 expense is not significant if you're going to California
3 or you're coming to Texas.

4 THE COURT: Well, I can tell you, having
5 been at an IP conference out there the last 30 days, the
6 cost of food and hotel rooms is significantly higher in
7 Northern California than it is in East Texas.

8 MR. SCHLATHER: Fair enough. I don't
9 disagree with that.

10 THE COURT: We may argue about how much it
11 costs to get there, but once you're there, the cost of
12 staying there is significantly higher.

13 MR. SCHLATHER: Very well. With regard to
14 other considerations, this case has progressed
15 significantly since the briefing was filed, including,
16 as the Court is aware, we've had a scheduling
17 conference, we've got trial dates and Markman dates.
18 Portal has served its infringement contentions,
19 discovery has begun. You heard Ms. Wright mention
20 exchange of initial disclosures. Yahoo's invalidity
21 contentions are due in mid-July. I think if the -- if
22 the case is transferred at this stage, essentially, they
23 get a significant amount of extra time to prepare those
24 invalidity contentions versus the schedule that we're on
25 now. I think that -- that prejudices Portal to a large

1 extent.

2 The last point I'll touch on is the judicial
3 economy. We've got two other cases in this Court. I'm
4 not aware that -- that any of the other Defendants have
5 filed motions to transfer. Regardless, I think judicial
6 economy weighs in favor of keeping those cases together.
7 As it stands now, they're on virtually identical
8 schedules. The Markman hearings are scheduled for the
9 same day, and they're set for trial the same day.

10 THE COURT: I gather Portal has no pending
11 cases regarding this patent or this technology in the
12 Northern District of California?

13 MR. SCHLATHER: We do not.

14 THE COURT: Okay.

15 MR. SCHLATHER: All -- all pending cases are
16 here in this court, Your Honor.

17 THE COURT: All right.

18 MR. SCHLATHER: So I think splitting it up,
19 in addition to at least doubling the judicial workload,
20 you now have two Courts hearing what amounts to the same
21 case or at least very similar cases. You also have the
22 possibility of conflicting results, especially at the --
23 at the claim construction stage where you have two
24 separate Courts construing claims in the same patent.

25 THE COURT: Well, you not only have the

1 possibility of inconsistent rulings between Courts both
2 as to claim construction, infringement, and invalidity,
3 but there are significant economies that can be achieved
4 by, though their separate cases, developing those cases
5 on a concurrent basis and moving toward both Markman and
6 trial, but the Court recognizes that's not the only
7 factor, but it is one that does make sense to the Court.

8 MR. SCHLATHER: Portal agrees, and I think
9 the Court recognized that in its scheduling orders
10 where, as I mentioned, the cases are moving forward
11 essentially in parallel.

12 THE COURT: What else, Counsel?

13 MR. SCHLATHER: That's all I have, Your
14 Honor. Thank you.

15 THE COURT: All right. Ms. Wright, any
16 response?

17 MS. WRIGHT: Just briefly, Your Honor.

18 I would just submit that in terms of the
19 delay that will occur potentially if this is
20 transferred, I don't argue with the fact that this case
21 is moving quickly here, but I don't think there has been
22 a whole lot of delay between the time that we filed our
23 motion and the time that we've had this hearing. And
24 if -- if we're going to be able to prevent transfer
25 based upon the fact that there may be some delay in

1 transferring, I don't think you're ever going to get
2 transferred because we know that the Eastern District of
3 Texas moves quickly.

4 I don't -- there have not been any
5 significant delays in this case. When it was filed, we
6 answered, we had our scheduling conference, we have
7 briefed this issue, you granted a hearing on it, we're
8 here today. I don't know that we could have moved any
9 quicker to get to this point. So I don't think there
10 has been anything at all that's significant. So I just
11 don't think that --

12 THE COURT: Well, I don't think -- I don't
13 think Portal is talking about what's happened from
14 filing to today as much as they are raising the issue
15 that if transfer is granted, their 2013 trial date is
16 going to be at least 2014.

17 MS. WRIGHT: Well, and I don't -- I don't
18 know that we can say one way or the other that that's
19 the case. I can say that it probably won't go to trial
20 on the date that it's scheduled. But my point is that
21 this is a factor that needs to be considered, and if
22 that alone is going to prevent delay, then we're never
23 going to transfer out of the Eastern District of Texas.

24 THE COURT: Well, I can tell you that the
25 Court's analysis is not going to be where any one factor

1 is going to be dispositive. All the factors are going
2 to have to be considered and weighed, and there are
3 appropriate weighing for or against transfer or being
4 neutral is going to have to be taken into account
5 collectively.

6 To my understanding, the only threshold
7 issue is one you both agree on, that this case could
8 have been in the Northern District of California. After
9 we cross that threshold, no single factor is
10 dispositive.

11 MS. WRIGHT: Correct, Your Honor.

12 THE COURT: Although, if a delay is going
13 to occur, that may be a factor to be considered, but
14 we're -- we're not going to deny -- if the -- if the
15 motion to transfer is denied, I can assure you it won't
16 be on the single basis of there's a delay in California.

17 MS. WRIGHT: Okay. And the only other
18 thing, and I may be beating India to death, but we do
19 agree that India is a long way away and that travel is
20 going to take a long time. But that's -- there are two
21 different issues to look at there with India, and one of
22 them is the convenience, and I don't want to leave
23 without making the point that it is more convenient for
24 the India witnesses to travel to California than it is
25 to Texas, basically because they do that on a routine --

1 maybe not a routine basis, but they do it several times
2 a year, and there are offices there where they can work,
3 so the disruption of their life is less in the Northern
4 District of California than it is in Texas, and although
5 that doesn't weigh into the cost factor, that does weigh
6 into the first factor for the convenience of the
7 witnesses.

8 THE COURT: But those witnesses are Yahoo
9 employees, they're not third parties who are not parties
10 in this litigation?

11 MS. WRIGHT: Correct.

12 THE COURT: Everyone smiled when I made the
13 comment about the cost being present and being housed
14 and fed in one venue as opposed to the other. But don't
15 you really think that is a -- a material difference?
16 You're talking about a Markman hearing at which counsel
17 are going to be present, if not corporate
18 representatives, you're talking about a trial that will
19 probably at least be a week long with multiple witnesses
20 and experts, and over the course of the entire case,
21 does Yahoo think that the pretty much in -- undisputed
22 differences in the cost of housing and food across the
23 board is -- is laughable, or do you really think that
24 really is a factor, not clearly a dispositive factor,
25 but a factor to be considered?

1 MS. WRIGHT: Well, I -- I do think that cost
2 overall in general is a factor.

3 THE COURT: I mean, as I read the cases,
4 it's not just convenience, it's also cost to the
5 parties.

6 MS. WRIGHT: I think they're two separate
7 factors, and I think they both have to be considered.
8 I've never seen an opinion where actual meal costs and
9 hotel costs were considered. That doesn't mean that
10 there's one out there. Usually the ones I see are
11 dealing with distance and -- and actual travel costs.

12 I do think it's a legitimate issue. You
13 have to eat, and you have to have somewhere to stay.
14 For the witnesses that reside in the Northern District,
15 obviously, that's not an issue. Again, we're dealing
16 with some Yahoo witnesses and the attorney who
17 prosecuted the patent. Again, for the folks that live
18 in Montana, the Eastern District of Texas might be
19 really expensive. I don't know.

20 THE COURT: But, I mean, unless Yahoo owns a
21 hotel, even Yahoo's own employees from India are going
22 to have to be housed and fed when they're either there
23 or here in relation to this case.

24 MS. WRIGHT: Correct, they will be.

25 THE COURT: Okay. Anything further in

1 response?

2 MS. WRIGHT: No, sir.

3 THE COURT: All right. Any final comments
4 from the Plaintiff?

5 MR. SCHLATHER: Nothing further, Your Honor.

6 THE COURT: All right. Thank you, Counsel.

7 Court will certainly take this under
8 advisement and try to get you a ruling as soon as
9 possible.

10 I think it would be advisable while I have
11 the benefit of you here to take up the issue on the
12 disputed protective order. I assume you're both
13 prepared to speak to that.

14 MS. WRIGHT: Yes, Your Honor.

15 MR. SCHLATHER: Yes, Your Honor.

16 THE COURT: Okay. It clearly relates to
17 the source code issues. I don't know -- I don't know,
18 Ms. Wright, if you're aware. I had a hearing, I believe
19 it was last week, in which Ms. Doan appeared for Yahoo
20 with regard to a disputed protective order. And I --

21 MS. WRIGHT: In the Princeton matter, Your
22 Honor?

23 THE COURT: Princeton, yes.

24 MS. WRIGHT: Yes, I am aware of that.

25 THE COURT: Okay. And I would expect that

1 many of my rulings in that matter with regard to source
2 code are going to be similar in this. I don't know if
3 that helps you narrow with opposing counsel where you
4 are in conflict with each other or not, and I'm not --
5 if you've not had a chance and if you think it would be
6 beneficial, I'm not opposed to a 10 or 15 minute recess
7 for you-all to talk further if you think it would narrow
8 these issues. If -- if you don't, then let's tee them
9 up and -- and see if we can get them before me and let
10 me give you a ruling.

11 MS. WRIGHT: I'm -- I'm more than willing to
12 visit. We haven't visited since our disputed --

13 THE COURT: Well, since the -- you know,
14 since the Princeton was so fresh and it was on much the
15 same topics, I think it might be a benefit.

16 Why don't we have about a 15-minute recess.
17 You two meet and confer about this protective order, and
18 then I'll come back in and see about what remaining
19 issues you need me to decide for you.

20 We'll be in recess for the next 15 minutes.

21 COURT SECURITY OFFICER: All rise.

22 (Recess.)

23 COURT SECURITY OFFICER: All rise.

24 THE COURT: Be seated, please.

25 All right. We'll return to the hearing on

1 Portal Technologies versus Yahoo. We had recessed to
2 give counsel an opportunity to discuss their varying
3 positions on the source code section of the protective
4 order.

5 Do we -- do you have anything to announce?
6 Have we narrowed the issues? Have we resolved
7 everything? Have you agreed on nothing? Tell me where
8 we are.

9 MR. DAVIS: Your Honor, we -- I believe we
10 have narrowed the issues. We're down to an issue of
11 source code printouts and whether or not source code
12 printouts -- whether Portal needs to provide copies of
13 those printouts to the Defendants as they are printed or
14 as they're taken from -- from the source code review
15 room. So I think that's the one outstanding issue.
16 Otherwise --

17 THE COURT: Well, what I did in the
18 Princeton case, Mr. Davis, was I provided that Portal
19 would wait to leave with their copies from the source
20 code room until such time as the other party could make
21 a copy and the documents could all be Bates stamped. So
22 that when -- when Portal leaves, they leave with Yahoo
23 having the -- having the same thing with the same Bates
24 number on it that they have.

25 MR. DAVIS: Your Honor, the -- our concern

1 with that is that allowing Yahoo to have exact copies of
2 the source code that we printed invades upon the work
3 product privilege in that they get to see what we think
4 is significant in the code, what we think -- what we
5 took from there to go -- you know, to go review or -- or
6 incorporated into our analysis and expert reports.

7 Now, obviously, some portions of those
8 printouts may be included in expert reports, but -- but
9 concern is that it does invade upon work product
10 privilege.

11 One suggestion we had is if the concern is
12 just keeping track of what's been printed, that an exact
13 copy of our printouts be kept in some sort of a sealed
14 envelope and if an issue arises, they would have a copy
15 of it. But if the issue is we want to see what you
16 printed to make a determination as to whether or not
17 it's relevant or whether or not you're taking too much
18 or too little --

19 THE COURT: Are there -- are there
20 limitations in this proposed protective order as to the
21 number of pages to be produced or copied?

22 MR. DAVIS: I believe the limitation is
23 reasonableness.

24 MS. WRIGHT: We -- in our proposal, there
25 was a limitation, no more than 15 consecutive or 500

1 total, but we're willing to agree --

2 THE COURT: Yeah, and I struck that down in
3 the last hearing.

4 MS. WRIGHT: Right. And -- and we
5 appreciate their position, but we just really -- our big
6 concern is them leaving without us knowing what they
7 have without an opportunity to resolve it before
8 something really important gets out the door, and
9 because once it's gone, we're in --

10 THE COURT: Well, if Mr. Smith will put down
11 his pen, and off the record.

12 (Off-the-record discussion.)

13 THE COURT: Back on the record. Source code
14 is a serious concern for any producing party, and
15 it's -- it's my -- it's my belief that though there
16 might be a possibility of tipping your hand, the need to
17 provide as much protection as reasonably possible to the
18 underlying genesis of the product outweighs that.

19 So I think Yahoo's entitled to have a copy
20 of what you take with you. However, you don't need to
21 be under any unreasonable or arbitrary limitations on
22 what you take, and if you choose to copy or take
23 portions that are simply to create a lack of clarity as
24 to what you may be focused on, that's certainly part of
25 your strategy that you can employ.

1 MR. DAVIS: Okay.

2 THE COURT: But I think they've got to bend
3 on the amount you can take, and you've got to bend on
4 the fact that they need a record of what left there. So
5 if that's an issue you can't agree on, that's going to
6 be my ruling on it.

7 MS. WRIGHT: Okay.

8 THE COURT: Do you have other issues that
9 you're not able to agree on?

10 MS. WRIGHT: I think we've agreed on the
11 provision that you had in the Princeton one where they
12 can't take documents that can record with the exception
13 of cell phones, and I think we've agreed on that.

14 MR. DAVIS: We have agreed on that. I
15 believe that's the only outstanding issue, Your Honor.
16 Otherwise, we'd be able to get you an agreed protective
17 order.

18 THE COURT: That would be the next step,
19 then, Mr. Davis, is for both of you to confer and submit
20 a joint proposed protective order, and if in that
21 process you find there is some remaining area of
22 disagreement, let my clerks know and we'll take it up,
23 but assuming there's not, then I'll be glad to enter
24 what you-all can agree to and submit jointly.

25 We've taken the motion to transfer under

1 advisement, and we've dealt with the issues on the
2 protective order. Is there anything else before the
3 Court that Counsel's aware of that we've not taken up?

4 MR. DAVIS: Nothing from the Plaintiff, Your
5 Honor.

6 MS. WRIGHT: No, Your Honor.

7 THE COURT: All right. Then with that,
8 you're excused and this hearing is at a conclusion.

9 Thank you, Counsel.

10 COURT SECURITY OFFICER: All rise.

11 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a
true and correct transcript from the stenographic notes
of the proceedings in the above-entitled matter to the
best of my ability.

SHELLY HOLMES	Date
Deputy Official Reporter	
State of Texas No.: 7804	
Expiration Date: 12/31/12	